In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 410 F. 2d 1156. The opinion of the district court (Pet. App. 12-21) is reported at 280 F. Supp. 473.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. A petition for rehearing was denied on June 9, 1969 (Pet. App. 23). Mr. Justice

Harlan extended the time for filing a petition for a writ of certiorari to August 8, 1969 (Pet. App. 24), and the petition was filed on August 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether failure to register with the Selective Service System is a continuing offense, for purposes of the statute of limitations, until the time an individual reaches the age of twenty-six.

2. Whether, after an initial failure to register, registration could not subsequently have been required because such late registration may have been self-incriminatory.

3. Whether the trial court erred in declining to instruct that conscientious objection may be a defense to a charge of failure to register.

STATUTE AND REGULATION INVOLVED

Section 3 of the Universal Military Training and Service Act, 62 Stat. 605, as amended, 65 Stat. 76 (50 U.S.C. App. 453), provides:

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be deter-

mined by proclamation of the President and by rules and regulations prescribed hereunder.

32 C.F.R. 1611.7(c) provides:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of knowingly and wilfully evading and refusing registration with the Selective Service System, in violation of 50 U.S.C. App. 462(a). On November 29, 1968, he was committed to the custody of the Attorney General pursuant to 18 U.S.C. 4208(b), with sentencing stayed pending appeal.

The evidence is undisputed that petitioner not only did not register for the draft in 1959, on attainment of his eighteenth birthday, but that he never registered thereafter (1 R. 87, 138, 140; 2 R. 280, 310).[1] In 1967, almost eight years later, he was arrested as a Selective Service law violator (1 R. 151), and the instant prosecution ensued.

Before trial petitioner claimed that since his initial failure to register had occurred in 1959, his

[1] "R." preceded by the volume number refers to the four-volume trial transcript on file with the Clerk of this Court.

1967 indictment and trial were barred by the running of the applicable five-year statute of limitations contained in 18 U.S.C. 3282. The district court denied the motion. The court determined that petitioner's offense in failing to register was a continuing one under the statute and the pertinent regulations, and that petitioner had remained under a duty to present himself for registration as long as he was liable for training and service in the Armed Forces, or until he reached age twenty-six (see 50 U.S.C. App. 454(a)), when the statute of limitations would have commenced to run (Pet. App. 13-14).[2]

At trial petitioner claimed to be a conscientious objector whose scruples would not permit him to "even take the first step of registration" (2 R. 310-312; 3 R. 432; 437), and caused him to oppose as well the performance of civilian work in lieu of military service as is required of those classified I-O (3 R. 443). The trial court instructed the jury that petitioner's motive, idealism and philosophy were immaterial, except as aids in determining intent and mental capacity (2 R. 233-234; 4 R. 589-590). However, it refused to charge, as requested by petitioner, that he was entitled to acquittal if his failure to register was found to be based on religious beliefs or moral scruples (see Pet. 24).

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[2] Petitioner was arrested with his thirty-three year old brother and both were charged with failing to register. The district court ruled, as to the brother, that the statute of limitations had run as more than five years had elapsed since his obligation to register had terminated at age twenty-six (Pet. App. 14-15), and the government acquiesced in that holding. Petitioner, however, was born on June 23, 1941, and thus was not yet twenty-six when he was indicted on May 4, 1967.

ARGUMENT

1. Petitioner argues that the offense defined by the statute (50 U.S.C. App. 453) was complete when he failed to register shortly after his eighteenth birthday; that the regulation (32 C.F.R. 1611.7(c)) imposing a continuing duty to register is beyond the scope of the statute; and hence that this prosecution was barred by the five-year statute of limitations. Petitioner does not dispute that, if the duty to register is a continuing one until age twenty-six, and can validly be made so consistent with the First and Fifth Amendments, the prosecution is not barred and he was properly convicted.

Whether an offense is a continuing one involves interpretation of congressional intent (see *Pendergast* v. *United States*, 317 U.S. 412, 420), similar in character to the determination of the "unit" of an offense (see *United States* v. *Universal Corp.* 344 U.S. 218, 224) or the extra-territorial application of the pertinent statute (see *United States* v. *Bowman*, 260 U.S. 94). While of course Congress may make explicit its desire that an offense should be deemed a continuing one, an express statement to that effect is not the only way in which such intent may be manifested. Courts have looked both to the nature of the conduct sought to be proscribed and the purpose of the statute to determine whether the offense defined is a continuing one. See *Bramblett* v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015; *United States* v. *Franklin*, 188 F. 2d 182 (C.A. 7). The purpose of registration within the Se-

lective Service System is to provide a basis for the classification and mobilization of manpower for military service. *E.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 377. A deliberate failure to register necessarily has a continuing effect on the efficient operation of the Selective Service System, for it reduces the pool of manpower known to be available for training and service. Even without the specific regulation, then, the offense of failure to register as required by Section 3 of the Act should be deemed a continuing offense,[3] at least, as in the situation here, for the period between ages eighteen and twenty-six when the individual would be liable for training and service. Thus, the regulation which spells out the continuing duty, contrary to petitioner's claim, is not in conflict with the statute. It accordingly does not involve any executive usurpation of legislative authority. Rather, it simply serves to give notice to all individuals of their continuing duty under the statute to register.[4] The decision of the court below that the prosecution was not barred by the statute of limitations is thus correct and in accord with the deci-

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[3] See *United States* v. *Franklin*, 188 F. 2d 182 (C.A. 2), holding failure to register under the Alien Registration Act to be a continuing offense.

[4] As the court of appeals pointed out, in discussing petitioner's Fifth Amendment contention, "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (Pet. App. 8). It is only the knowing and wilful failure to register that provides the predicate for criminal prosecution. As the court below further noted, "the aim is to get qualified registrants—even delinquent ones—into the armed forces rather than into jail" (*ibid.*).

sions of other circuits which have had occasion to consider the issue. *Fogel* v. *United States*, 162 F. 2d 54 (C.A. 5), certiorari denied, 332 U.S. 791; *McGregor* v. *United States*, 206 F. 2d 583 (C.A. 4); see *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2); *Gara* v. *United States*, 178 F. 2d 38 (C.A. 6), affirmed on another point by an equally divided court, 340 U.S. 857.[5]

2. Petitioner contends that, even if he was under a continuing duty to register, he cannot be prosecuted for breach of that duty because any registration after his initial failure to do so would have been self-incriminatory. While having some superficial plausibility, this argument, if accepted, would extend *Marchetti* v. *United States*, 390 U.S. 39, and the related cases on which petitioner relies (see Pet. App. 7) far beyond their underlying purpose and rationale. The vice which this Court found in the registration requirements involved in the *Marchetti* line of cases is that the *initial* registration might well serve to incriminate the registrant with respect to some other crimes. That, obviously, is not the situation as regards registration with the Selective Service System. The statute as such thus does not compel incrimination. The mere fact that a late registration might reveal a prior breach of duty thus cannot con-

[5] At all events, 18 U.S.C. 3282 begins with the phrase "[e]xcept as otherwise expressly provided by law." In view of this language, the court below concluded that "even if construed as an extension or a tolling of the statute of limitations to five years after age 26, the continuing duty regulation is an express provision of 'law'" (Pet. App. 5-6).

vert the general registration requirement into a provision violative of the Fifth Amendment. As the court below pointed out (Pet. App. 9), since only one offense—albeit a continuing one—is committed by failure to register, the individual is "not being put to a cruel choice that the privilege is designed to avoid." A person could not excuse his failure to pay income tax for a particular year on the ground that payment might disclose that he had failed to file a return the prior year—a separate crime. Similarly, here, since the act of registration is not incriminatory, petitioner's initial failure to register cannot serve to absolve him of his continuing duty to do so; nor can that failure be excused by invocation of the Fifth Amendment.

3. Finally, petitioner urges that the jury should have been instructed to acquit if it found that he had a conscientious, religiously motivated view that registration for the draft was immoral (Pet. 24). The trial court properly declined so to instruct. There is no absolute right to exemption from military service because of religious or moral beliefs, however conscientious. *Tyrrell* v. *United States*, 200 F. 2d 8 (C.A. 9), certiorari denied, 345 U.S. 910; *Van Bibber* v. *United States*, 151 F. 2d 444, 446-447 (C.A. 8). And certainly the mere requirement of registration does not violate any constitutional right of religious freedom. *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892. Since sincerity of belief does not excuse a knowing and wilful breach of a statutory duty, it is simply not a question for a

jury to determine. *Loewing* v. *United States*, 392 F. 2d 218 (C.A. 10); *O'Moore* v. *United States*, 370 F. 2d 916 (C.A. 5); *Tyrrell* v. *United States*, *supra*, 200 F. 2d 8 (C.A. 9), certiorari denied, 345 U.S. 910; see *Walker* v. *City of Birmingham*, 388 U.S. 307, 320-321. In short, the jury was adequately charged regarding the pertinent law.

CONCLUSION

For the following reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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